clearly repugnant to the other terms. See *Humfrey v. Dale, supra,* per Lord Campbell. The cases are in confusion and the courts appear to decide each case according to its own peculiar circumstances. *Sutro v. Heilbut* [1917, C. A.] 2 K. B. 348 (transportation by land substituted in term of contract specifying transportation by water, when necessary); *McDonald v. Union Hay Co.* (1919) 143 Minn. 40, 172 N. W. 891 (usage admitted to show requirement of 24 hour ultimatum before breach could be operative); but see *contra, Hart v. Cort* (1914) 165 App. Div. 583, 151 N. Y. Supp. 4 (usage not admissible to show that license to produce play meant an exclusive license). If in the instant case the contract had called for delivery *unconditionally,* the usage would be clearly repugnant. But the words of the contract are not such as specifically to exclude the usage. Thus it seems that in admitting the usage, the principal case is in accord with the better view.

CRIMINAL LAW—SCIENTER AND INTENT UNNECESSARY IN STATUTORY CRIMES.—The plaintiff junk dealer was indicted and pleaded guilty under section 169 of the federal Criminal Code, which declares that "whoever, without lawful authority, shall have in his possession" any die which could be used in counterfeiting United States coin, shall be punished. He made an explanatory statement to the court outside his pleadings that the dies came into his possession without his knowledge in a purchase of junk. He then sued out a writ of habeas corpus, and contended that the law was contrary to the Fifth Amendment in that it made criminal a possession which was neither willing nor conscious. *Held,* that the law was constitutional. *Baender v. Barnett* (1921) 41 Sup. Ct. 271.

In deciding the case the court states that the statute must be construed as intending to make criminal only a willing and conscious possession of such dies, and that by pleading not guilty and showing his ignorance of the presence of them he would not have been convicted. The rule at common law is that a mere intention to commit a crime without any overt act accompanying it, or a mere overt act with no intention to commit a crime is not punishable. 1 Bishop, *New Criminal Law* (8th ed. 1892) secs. 204-208. In statutory crimes, a criminal intent not connected with any overt act may not be punished as a crime, and any statute purporting to do so is unconstitutional. *Ex parte Smith* (1896) 135 Mo. 223, 36 S. W. 628; *Proctor v. State* (1918, Okla. Cr. App.) 176 Pac. 771. It is held that an overt act done contrary to the letter of the statute, but with no criminal intent to violate it, is punishable as a crime. *People v. Emmons* (1913) 178 Mich. 126, 144 N. W. 479; *State v. Smith* (1920, Mont.) 190 Pac. 107. However, it has been stated that even an unconscious possession of a prohibited article would be sufficient ground for a valid conviction, though "a conviction would be unlikely." See *People v. Johnson* (1919) 288 Ill. 442, 445, 123 N. E. 543, 545. Where a storekeeper sold naphtha under a trade name of "Lustro," not knowing it was naphtha, he was found guilty under a statute forbidding its sale. *Gately v. Taylor* (1912) 211 Mass. 60, 97 N. E. 619. The same result was reached in a sale of oleomargarine. *State v. Newton* (1885, Sup. Ct.) 50 N. J. L. 534. It is submitted that under sufficient necessity the legislatures might declare even a totally unconscious possession of an article sufficient ground for a valid conviction.

INSURANCE—STANDARD FIRE POLICY—VALIDITY OF THE CO-INSURANCE CLAUSE.—The plaintiff was insured with the defendant company under a fire policy in the standard form. The defendant inserted in this policy a co-insurance clause by which, if the plaintiff failed to carry insurance up to 80 per cent of the value of the property, the defendant would not be liable for a greater proportion of any loss than the sum insured bears to 80 per cent of the value of the property at the time of loss. The standard policy laws permit the addition of clauses,

provided that no such clause is "inconsistent with or a waiver of any of the conditions of the standard fire insurance policy." In the absence of such a co-insurance clause the terms of the standard policy secure to the insured payment of his entire loss up to the amount of the insurance. The pro rata clause of the standard fire policy provides that "This company shall not be liable for a greater proportion of any loss or damage than the amount hereby insured shall bear to the whole insurance covering the property, *whether valid or not and whether collectible or not.*" The plaintiff failed to carry insurance up to 80 per cent of the value of his property, and, in an action to recover for a loss, the defendant set up the co-insurance clause as a bar to full recovery. The plaintiff contended that this clause was inconsistent with the standard fire policy and void. *Held,* that the co-insurance clause was valid, since the pro rata clause was meant to include co-insurance, and since the legislature must be deemed to have considered this clause valid from its long continued use with the legislature's knowledge. Page, J., *dissenting. Aldrich v. Great Amer. Ins. Co.* (1921, App. Div.) 186 N. Y. Supp. 569.

The purpose of the standard fire policy laws was primarily to protect the insured against unusual and unnoticed conditions which would serve to defeat his well grounded expectations. *Quinlan v. Insurance Co.* (1892) 133 N. Y. 356, 31 N. E. 31; *Gazzam v. Insurance Co.* (1911) 155 N. C. 330, 71 S. E. 434; Vance, *Insurance* (1904) 432. Contracts of insurance made in any other form are wholly unenforceable as against the insured, but are enforceable as against the insurer. *Armstrong v. Insurance Co.* (1893) 95 Mich. 137, 54 N. W. 637; *Hicks v. Ass. Co.* (1900) 162 N. Y. 284, 56 N. E. 743. The rule of construction in favor of the insured applies to the standard policy as strictly as it formerly applied to the old forms. *Matthews v. Insurance Co.* (1897) 154 N. Y. 449, 456, 48 N. E. 751, 752; *Davis & Co. v. Insurance Co.* (1897) 115 Mich. 382, 73 N. W. 393. The co-insurance clause has been held inconsistent with the Kentucky valued policy laws and thus void. *Sachs v. Insurance Co.* (1902) 113 Ky. 88, 67 S. W. 23; *Hartford Ins. Co. v. Henderson Brewing Co.* (1916) 168 Ky. 715, 182 S. W. 852. In several states the co-insurance clause is expressly forbidden by statute. See Mo. Rev. St. 1909, sec. 7023; Wis. St. 1911, sec. 1943a; *Alsop Process Co. v. Insurance Co.* (1914) 175 Mo. App. 317, 162 S. W. 313. Some of these states forbid it except upon the express written request of the insured upon a form prescribed by statute. See Supp. Code Iowa 1913, sec. 1746; Mich. Comp. Laws 1915, secs. 9484-9489; *Att'y General v. Commissioner of Ins.* (1907) 148 Mich. 566, 112 N. W. 132. The court in the instant case concedes that "The co-insurance clause is a dangerous thing for a person who does not understand it . . . in the sense that he will not get what he thinks he is going to get." An examination of the clause and the labored explanation of the pro rata clause given in the opinion suggests that the average insured—if perchance he should read his policy—would not understand it. And the very purpose of the standard fire policy was to prevent such clauses from depriving the insured of "what he thinks he is going to get." The plain meaning of the pro rata clause would seem to forbid the interpretation placed upon it by the court. Nor is there any adequate reason why silence on the part of the legislature should be construed as giving consent to it. It is submitted, therefore, that the co-insurance clause should have been held invalid, a result reached in a recent case in the New York Supreme Court, which the instant case overrules. *Durham v. Insurance Co.* (1920, Sup. Ct.) 112 Misc. 440, 182 N. Y. Supp. 887.

INSURANCE—WARRANTY OF SEAWORTHINESS—WAIVER AND ESTOPPEL.—The insurance company's inspector reported to it that the ship in question was an undesirable risk. Later, the company issued a policy at a higher rate than usual, containing a warranty of seaworthiness. There was some evidence that at that